

(4)

Supreme Court, U.S.

FILED

APR 11 1997

No. 96-792

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LYNNE KALINA,
Petitioner,
v.

RODNEY FLETCHER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

NORM MALENG
*King County Prosecuting
Attorney*
MICHAEL C. DUGGAN
Sr. Deputy Prosecuting Attorney
JOHN W. COBB *
Sr. Deputy Prosecuting Attorney
700 5th Ave.
Suite 3900
Seattle, WA 98104
(206) 296-8820
Attorneys for Petitioner
* *Counsel of Record*

TIMOTHY K. FORD *
ROBERT S. MAHLER
MACDONALD, HOAGUE &
BAYLESS
705 2nd Avenue, Suite 1500
Seattle, WA 98104
(206) 622-1604
BRADY R. JOHNSON
506 2nd Avenue, Suite 1406
Seattle, WA 98104
(206) 682-2830
Attorneys for Respondent

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1996
CERTIORARI GRANTED FEBRUARY 24, 1997

39 pp

TABLE OF CONTENTS

	Page
Docket Entries	1
Complaint For Damages (Civil Rights 42 U.S.C. § 1983) (Exhibit A omitted), filed March 13, 1995.....	4
Answer of Defendant and Demand for Jury, filed June 12, 1995	8
Affidavit of Lynne Kalina with Exhibits A, B and C, filed August 4, 1995	11
Minute Order of the United States District Court Western District of Washington	21
Opinion of the United States Court of Appeals for the Ninth Circuit	22
Washington Criminal Rule 2.1	30
Washington Criminal Rule 2.2	31
Washington Revised Code 36.27.020	34
Washington Revised Code 10.37.010	37

UNITED STATES DISTRICT COURT
WESTERN WASHINGTON
(SEATTLE)

No. C 95-3792

RODNEY FLETCHER,
Plaintiff

v.

LYNNE KALINA,
Defendant

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/13/95	1 COMPLAINT FOR DAMAGES (Summons(es) issued) Receipt #222324 (jg) [Entry date 03/14/95]
6/12/95	6 ANSWER to complaint [1-1] by defendant Lynne Kalina; jury demand (jg) [Entry date 06/13/95]
6/12/95	7 AFFIDAVIT OF SERVICE by defendant Lynne Kalina of answer [6-1] (jg) [Entry date 06/13/95]
8/4/95	12 MOTION by defendant Lynne Kalina for summary judgment noted for 9/1/95 (jg) [Entry date 08/07/95]
8/4/95	13 MEMORANDUM by defendant Lynne Kalina in support of motion for summary judgment [12-1] (jg) [Entry date 08/07/95]
8/4/95	14 AFFIDAVIT of Lynne Kalina regarding motion for summary judgment [12-1] (jg) [Entry date 08/07/95]

DATE	PROCEEDINGS
8/24/95	15 RESPONSE by plaintiff to motion for summary judgment [12-1] (rs) [Entry date 08/25/95]
8/31/95	16 REPLY MEMORANDUM by defendant Lynne Kalina in support of motion for summary judgment [12-1] (jg) [Entry date 09/05/95]
8/31/95	17 AFFIDAVIT OF SERVICE by defendant Lynne Kalina of motion reply in support of mtn for sum jgm [16-1] (jg) [Entry date 09/05/95]
10/19/95	18 MINUTE ORDER: by Judge Thomas S. Zilly DENYING Dft's motion for summary judgment [12-1] (cc: counsel, Judge) (jg) [Entry date 10/20/95]
10/30/95	19 NOTICE OF APPEAL by defendant Lynne Kalina from Dist. Court decision [18-1] (cc: CCA, Judge, counsel) (ss) [Entry date 11/03/95]
10/30/95	21 AFFIDAVIT OF SERVICE by defendant Lynne Kalina of appeal [19] and representation statement [20] (ss) [Entry date 11/03/95]
11/3/95	— CERTIFICATE OF RECORD Transmitted to USCA (cc: all counsel) (ss)
11/3/95	— APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (ss)
11/3/95	— ENT- "CADS" to CCA with appeals packet (ss)
11/8/95	— Filed certificate of record on appeal RT filed in DC n/t [95-36129] (sf)
11/8/95	— Filed attorney for Appellant Civil Appeals Docketing Statement served on 10/30/95 (to CONFATT) [95-36129] [95-36129] (sf)

DATE	PROCEEDINGS
6/21/96	— CLERK'S RECORD on APPEAL transmitted to Circuit (ss)
7/10/96	— Filed, as of 11/08/95, certified record on appeal in 1 Vols. (total): 1 Clerks Rec 0 RTs (Original) [95-36129] (sm)
8/7/96	— ARGUED AND SUBMITTED TO Eugene A. WRIGHT, Robert R. BEEZER, Diarmuid F. O'SCANNLAIN [95-36129] (tsp)
8/22/96	— FILED OPINION: We AFFIRM THE denial of summary judgment and REMAND for further proceedings. (Terminated on the Merits after Oral Hearings; Affirmed; Written, Signed, Published. Eugene A. WRIGHT, author; Robert R. BEEZER; Diarmuid F. O'SCANNLAIN) FILED AND ENTERED JUDGMENT. [95-36129] (sm)
9/9/96	— Filed Appellant Lynne Kalina's motion to stay the mandate. [95-36129] served on 9/6/96 [Author JUDGE] [95-36129] (mhf)
9/18/96	— Filed order (Eugene A. WRIGHT): Appellant's motion for stay of the issuance of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(b). Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court. [3080681-1] [95-36129] (sm)
12/3/96	— Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 96-792 filed on 11/18/96. [95-36129] (mlm)
2/28/97	— Received notice from Supreme Court, petition for certiorari GRANTED on 2/24/97. Supreme Court No. 96-792 PANEL (em)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C95-03792

RODNEY FLETCHER,
vs.
LYNNE KALINA,
Plaintiff
Defendant

COMPLAINT FOR DAMAGES
(Civil Rights 42 U.S.C. § 1983)

Plaintiff Rodney Fletcher, through his undersigned counsel, alleges as follows:

I. PARTIES

1.1 Rodney Fletcher is an adult resident of King County in the State of Washington.

1.2 Lynne Kalina is an adult resident of the State of Washington with a business address of King County Courthouse, 516 Third Avenue Room W554, Seattle, Washington.

II. JURISDICTION

2.1 This court has jurisdiction over this action pursuant to 42 U.S.C. § 1343, § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution.

2.2 Plaintiff is a resident of King County, Washington and the events described herein occurred in King County, Washington.

III. FACTS

3.1 Defendant Lynne Kalina at all times relevant to this matter was employed by Norm Maleng, King County Prosecuting Attorney and by the Office of the King County Prosecuting Attorney, an Agency of King County.

3.2 On or about December 14, 1992 Lynne Kalina prepared and filed a Certification for Determination of Probable Cause ("Certification") a copy of which is attached as Exhibit A.

3.3 In the Certification, defendant Lynne Kalina made false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution.

3.4 In the Certification, defendant Lynne Kalina falsely accused Mr. Fletcher of breaking into the Our Lady of Guadalupe School in King County, Washington, and of committing certain acts while within the school, including damaging a vending machine and stealing property.

3.5 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher had never been associated with the school and did not have permission to enter the school. In fact, Mr. Fletcher had been hired to install partitions and had performed extensive work, at and for the school, was known to the school personnel and was authorized to enter onto the premises.

3.6 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher was identified from a photo montage by an eye witness. In fact, two eye witnesses failed to identify Mr. Fletcher from the photo montage and now [sic] witness identified him. These failed photo identifications were detailed specifically in the Seattle Police Department reports and statements that were available to Ms. Kalina at the time that she prepared the Certification.

3.7 Pursuant to the recitations in the Certification, an arrest warrant was issued for Rodney Fletcher and on September 24, 1993 Mr. Fletcher was arrested on a charge of Burglary in the Second Degree.

3.8 On or about October 26, 1993 the aforementioned charges were dismissed on motion of the Prosecuting Attorney.

IV. DAMAGES

4.1 As a direct and proximate result of the actions of Lynne Kalina described above, plaintiff suffered a loss of liberty, incurred legal fees, suffered damage to his reputation, experienced pain and suffering and emotional distress, suffered wage loss, and lost earning capacity and the enjoyment of life. Some of these damages are ongoing and permanent in nature.

V. CLAIM FOR RELIEF

5.1 The actions of defendant Kalina as alleged herein violated plaintiff's civil and constitutional rights, including the right to be free from unreasonable seizures and from deprivation of liberty, without due process of the law, guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983 *et seq.*

VI. PRAYER

WHEREFORE, plaintiff prays for the following relief against defendant:

1. Full compensatory damages;
2. Punitive damages;
3. Attorney fees and costs under 42 U.S.C. § 1988;
and
4. Such other relief as is reasonable and equitable.

DATED this 12th day of January, 1995.

LAW OFFICES OF
BRADY R. JOHNSON

By /s/ Brady R. Johnson
BRADY R. JOHNSON WSBA #21732

MACDONALD, HOAGUE & BAYLESS

By /s/ Timothy K. Ford
TIMOTHY K. FORD, WSBA #5986

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C95-379Z

RODNEY FLETCHER,

Plaintiff

vs.

LYNNE KALINA,

Defendant

ANSWER OF DEFENDANT AND DEMAND FOR JURY

For her answer to plaintiff's Complaint for Damages, defendant Lynne Kalina admits, denies and alleges as follows:

I. PARTIES

1.1 Answering paragraph 1.1 of plaintiff's complaint, defendant admits the allegations therein.

1.2 Answering paragraph 1.2 of plaintiff's complaint, defendant admits the allegations therein.

II. JURISDICTION

2.1 Answering paragraph 2.1 of plaintiff's complaint, defendant makes no answer as the allegations contained therein are a legal conclusion.

2.2 Answering paragraph 2.2 of plaintiff's complaint, defendant admits the allegations therein.

III. FACTS

3.1 Answering paragraph 3.1 of plaintiff's complaint, defendant admits the allegations therein.

3.2 Answering paragraph 3.2 of plaintiff's complaint, defendant admits the allegations therein.

3.3 Answering paragraph 3.3 of plaintiff's complaint, defendant denies the allegations therein.

3.4 Answering paragraph 3.4 of plaintiff's complaint, defendant denies the allegations therein.

3.5 Answering paragraph 3.5 of plaintiff's complaint, defendant denies the allegations therein.

3.6 Answering paragraph 3.6 of plaintiff's complaint, defendant denies the allegations therein based on lack of information and knowledge.

3.7 Answering paragraph 3.7 of plaintiff's complaint, defendant admits the allegations therein.

3.8 Answering paragraph 3.8 of plaintiff's complaint, defendant admits the allegations therein.

IV. DAMAGES

4.1 Answering paragraph 4.1 of plaintiff's complaint, defendant denies the allegations therein.

V. CLAIM FOR RELIEF

5.1 Answering paragraph 5.1 of plaintiff's complaint, defendant denies the allegations therein.

BY WAY OF FURTHER ANSWER AND AS AFFIRMATIVE DEFENSE, defendant alleges as follows:

1. Plaintiff has failed to state a claim upon which relief can be granted.

2. Defendant is immune from suit based on the doctrine of absolute prosecutorial immunity.

3. Defendant at all times acted in good faith in the performance of her duties and is therefore qualified immune.

4. Plaintiff's claim is frivolous and advance without good cause.

WHEREFORE, defendant requests that plaintiff's claims be dismissed with prejudice, that plaintiff take nothing by his complaint and that defendant be awarded her costs, reasonable attorneys fees and sanctions against plaintiff and his attorneys for bringing this action.

JURY DEMAND

This party hereby demands this case be tried to a jury of twelve persons.

DATED this 9 day of June, 1995.

NORM MALENG
King County Prosecuting
Attorney

By: /s/ John W. Cobb
JOHN W. COBB
WSBA #14304
Senior Deputy Prosecuting
Attorney
Attorneys for Defendant

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

HONORABLE THOMAS S. ZILLY

No. C95-379Z

RODNEY FLETCHER,
Plaintiff,

v.

LYNNE KALINA,
Defendant.

AFFIDAVIT OF LYNNE KALINA

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Lynne Kalina, being first duly sworn on oath, deposes and states as follows:

1. I am a Deputy Prosecuting Attorney for King County and have been so employed since October 15, 1990. I have personal knowledge of the matters contained herein and I am competent to testify.

2. In November, 1992, I was assigned to the filing unit within our office. My duties in that position included the review of cases referred by various police agencies for the purpose of determining whether criminal charges should be filed. On November 30, 1992, the Seattle Police Department referred a burglary case to our office in which the suspect was the plaintiff, Rodney Steven Fletcher. I reviewed this case and determined that our office would file criminal charges against Mr. Fletcher.

3. On or about December 7, 1992, I personally prepared an Information charging Mr. Fletcher with Burglary in the Second Degree. A true and correct copy of that Information is attached hereto as exhibit A. On that same date, I also prepared a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail (attached as Exhibit B) and a Certification for Determination of Probable Cause (attached as Exhibit C) which I personally signed.

4. All three of the documents referred to in paragraph 3 above where [sic] filed with the King County Superior Court on December 14, 1992. That same day, the Honorable Carmen Otero granted my motion and ordered that an arrest warrant be issued for Mr. Fletcher so that he could be brought before the Court to respond to the charges against him.

5. The filing of the Information and request for the arrest warrant were done contemporaneously as a part of the initiation of the prosecution against Mr. Fletcher.

/s/ Lynne Kalina
LYNNE KALINA

[Notary Omitted in Printing]

EXHIBIT A

[Filed Dec. 14, 1992]

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

No. 92-1-07863-1

THE STATE OF WASHINGTON,
v. *Plaintiff,*
RODNEY STEVEN FLETCHER,
Defendant.

INFORMATION

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse RODNEY STEVEN FLETCHER of the crime of Burglary in the Second Degree, committed as follows:

That the defendant RODNEY STEVEN FLETCHER in King County, Washington during a period of time intervening between July 26, 1992 through July 27, 1992, did enter and remain unlawfully in a building, located at 3401 Southwest Myrtle Street, Seattle (Our Lady of Guadalupe School), in said county and state, with intent to commit a crime against a person or property therein;

Contrary to RCW 9A.52.030, and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: /s/ Lynne Kalina
LYNNE KALINA
WSBA #91002
Deputy Prosecuting Attorney

EXHIBIT B

[Filed Dec. 14, 1992]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 92-1-07863-1

THE STATE OF WASHINGTON,
v. *Plaintiff,*RODNEY STEVEN FLETCHER,
*Defendant.*MOTION AND ORDER DETERMINING THE
EXISTENCE OF PROBABLE CAUSE,
DIRECTING ISSUANCE OF WARRANT AND
FIXING BAIL

The plaintiff, having informed the court that it is filing herein an Information charging the defendant with the crime of Burglary in the Second Degree now moves the court for an order determining the existence of probable cause and directing the issuance of a warrant for the arrest of the defendant, and

() fixing the bail of the defendant in the amount of _____, cash or approved surety bond.

(X) directing the release of the defendant, after booking, on his or her personal recognizance and promise to appear for arraignment at the scheduled time and date.

In connection with this motion, the plaintiff offers the information on the Suspect Information Report attached to this motion and the affidavit attached to the Information.

NORM MALENG
Prosecuting AttorneyBy: /s/ Lynne Kalina
LYNNE KALINA
WSBA #9102
Deputy Prosecuting Attorney

ORDER

The court, having reviewed the affidavit submitted herein hereby determines that probable cause exists to believe that the above-named defendant committed the crime alleged in the Information herein; and

IT IS ORDERED that the Clerk of the Superior Court issue a warrant, returnable forthwith, for the arrest of the above-named defendant; and

IT IS FURTHER ORDERED that

() the bail of the defendant be fixed in the amount of ———, cash or approved surety bond.

(X) the defendant be released, after booking, on his or her personal recognizance and promise to appear for arraignment at the scheduled time and date.

IT IS FURTHER ORDERED that the defendant be advised of the amount of bail fixed by the court and/or conditions of his or her release, and of his or her right to request a reduction of bail and to be heard thereon. Service of the warrant by telegraph or teletype is authorized.

DONE IN OPEN COURT this 14 day of December, 1992.

/s/ Carmen Otero
Judge

Presented by:

/s/ Lynne Kalina
LYNNE KALINA
WSBA #91002
Deputy Prosecuting Attorney

SUSPECT INFORMATION REPORT				SEATTLE			
DATE OF REPORT 11-23-92		TIME 1300		POLICE DEPARTMENT UNIT 313		B/TS 92- 276	
BOOKING DATE		TIME		OFFENSE BURGLARY		S/A NUMBER	
<div style="display: flex; justify-content: space-between;"> <div> NAME FLETCHER, Rodney Steven DATE OF BIRTH 092760 STATE OR PROVINCE OF BIRTH Minnesota SCARS, MARKS, TATTOOS, ANY OTHER BODY PARTS, ETC. </div> <div> LAST FIRST MIDDLE - MR., MRS., (ST, JRD, SRD) SEX male EYES blue HAIR bln WEIGHT 190 HEIGHT 6-2 CAUTION - ARMED, DANGEROUS STATEMENT TAKEN? <input checked="" type="checkbox"/> OWN SEAL PROPERTY? <input checked="" type="checkbox"/> </div> <div> RACE white SKIN TONE med STATEMENT TAKEN? <input checked="" type="checkbox"/> OWN SEAL PROPERTY? <input checked="" type="checkbox"/> </div> </div>							
LAST KNOWN ADDRESS - CITY, STATE, ZIP 24823 21st Ave S, Kent				DRIVER LICENSE NUMBER FLFVCRS40207			
STATE XX WA 92		SOCIAL SECURITY NUMBER LOCAL NUMBER		FBI NUMBER 583044WB		STATE ID NUMBER	
FINGERPRINT CLASSIFICATION				ALIAS NAME(S)			
VEHICLE I.D. NO.		YEAR		MAKE		MODEL	
BUSINESS ADDRESS OR SCHOOL (COMPANY NAME - ADDRESS - DEPARTMENT OR SHOP NO. AND PHONE)		LIVING WITH		TIME IN COUNTY		UNION AND LOCAL NUMBER	
OCCUPATION Laborer		Unk					
INVESTIGATING OFFICER Det G K Ruedebusch		SERIAL 2734		UNIT 313		PHONE 386-1875	
CRIMINAL RECORD (CONVICTIONS)		None		APPROVING OFFICER <i>[Signature]</i>		NAME(S) OF ACCOMPLICE <i>[Signature]</i>	
<p style="text-align: center;">ARRESTING AGENCY AFFIDAVIT</p> <p>(CONCISELY SET FORTH FACTS SHOWING PROBABLE CAUSE FOR EACH ELEMENT OF THE OFFENSE AND THAT THE SUSPECT COMMITTED THE OFFENSE, IF NOT PROVIDED, THE SUSPECT WILL BE AUTOMATICALLY RELEASED. INDICATE ANY WEAPON INVOLVED).</p> <p>On 7-26-92 between 1400 hrs and 0650 hrs on 7-27-92 susp went to Our Lady of Guadalupe school, located at 3401 SW Myrtle St, Seattle, WA. Susp broke into VB and stole a computer, two printers and a modem. Susp's finger prints were I.D. inside VB in a location that could only be put there by the susp. Susp did not have permission to enter or remove anything from VB.</p> <p style="text-align: right; font-size: 1.2em;">22-1-078000</p>							
I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.				DATE AND PLACE 11-23-92 SPD 1			
LAW ENFORCEMENT POSITION ON RELEASE: WARRANT STATUS OF INDIVIDUAL OR PUBLIC BE THREATENED IF SUSPECT RELEASED ON BAIL OR RECOGNIZANCE (CONSIDER HISTORY OF VIOLENCE, MENTAL ILLNESS, DRUG DEPENDENCY - AS SPECIFIC) ANY OTHER REASONS WHY SUSPECT SHOULD NOT BE RELEASED (CONSIDER PRIOR FAILURE TO APPEAR, LACK OF TIES TO COMMUNITY - AS SPECIFIC). NONE							
ANTICIPATED DATE OF REVERSAL				ANTICIPATED CHARGE			
11-24-92				BURGLARY 2			
PRELIMINARY APPEARANCE INFORMATION		JUDGE		BOND POSTED		AMOUNT IS	
DATE		DATE		DATE		CO	
YES <input type="checkbox"/> NO <input type="checkbox"/> CONDITIONS		YES <input type="checkbox"/> NO <input type="checkbox"/> SECURED		YES <input type="checkbox"/> NO <input type="checkbox"/> NOT RELEASED		FUND SET IS	
RETURN DATE							

EXHIBIT C

CAUSE NO. 92-1-07863-1

CERTIFICATION FOR DETERMINATION
OF PROBABLE CAUSE

That Lynne Kalina is a Deputy Prosecuting Attorney for King County and is familiar with the police report and investigation conducted in Seattle Police Department case No. 92-334054;

That this case contains the following upon which this motion for the determination of probable cause is made.

Our Lady of Guadalupe School is located at 3401 Southwest Myrtle Street, Seattle, King County, Washington. George Christman is the custodian of the school. On July 27, 1992, at 6:50, Christman discovered that sometime during the previous night, the kitchen window had been pried open in a manner which would allow entry into the school. Christman called the police.

Investigation showed that the burglar had cut a hole in a plexiglass kitchen window, reached in, and pried open the window. The burglar had ripped out a restrictive bar to allow the window to open fully. Once inside the building, the burglar had searched through cabinets and forced open several doors. The burglar forced open a Coke machine, taking about \$2 in change. The burglar had climbed over a glass partition into the school office and had taken a computer, two printers, and a modem. The burglar exited out of the office door.

Seattle Police Department Officer Burton was able to lift fresh latent prints from the partition and from a paper clip box which had been emptied. Seattle Police Department Identification Technician Holshue positively identified several prints lifted as Rodney Fletcher's prints. The defendant, Rodney Fletcher, has never been asso-

ciated with the school in any manner and did not have permission to enter the school or to take any property.

On July 27, 1992, at 2:30 p.m., the defendant entered Empire Electronics and contacted employee Lance Brandon. The defendant asked Brandon to give an appraisal on a computer which was in his car. Brandon went to a car which was occupied by Jerry Ward. Brandon told the defendant that the computer was worth about \$200, but wanted to see if the computer was in working order before buying it. The defendant brought the computer into the store.

Brandon noticed that the computer's serial number had been removed. Brandon told the defendant that he needed the serial number, so the defendant left the store to retrieve the serial number. Brandon worked with the computer while the defendant was absent and noticed information on the hard drive indicating that the computer belonged to Our Lady of Guadalupe School.

Brandon called the police, but before the police arrived, the defendant and Ward returned to the store. Brandon told the defendant that he could not buy the computer because the defendant did not have any identification. The defendant took the computer and left the store. Brandon later identified the defendant from a photo montage.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 7 day of December, 1992, at Seattle, Washington.

/s/ Lynne Kalina
LYNNE KALINA
WSBA #91002

[Filed Oct. 19, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C95-379Z

RODNEY FLETCHER,

v.

Plaintiff,

LYNNE KALINA,

Defendant.

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U.S. District Judge:

The Court DENIES defendant's motion for summary judgment, docket no. 12. *Buckley v. Fitzsimmons*, 509 U.S. —, 125 L.Ed.2d 209, 113 S. Ct. 2606 (1993); *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S. Ct. 1092 (1986); *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S. Ct. 984 (1976). The Court concludes that defendant is not entitled to absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. —, 125 L.Ed.2d 209, 113 S. Ct. 2606 (1993); *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S. Ct. 1092 (1986). Whether qualified immunity will apply in this case is a question of fact.

The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 19th day of October, 1995.

BRUCE RIFKIN
Clerk

By /s/ Casey Condon
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36129
D.C. No. CV-95-00379-TSZ

RODNEY FLETCHER,
Plaintiff-Appellee,
v.

LYNNE KALINA,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
August 7, 1996—Seattle, Washington

Filed August 22, 1996

Before: Eugene A. Wright, Robert R. Beezer and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wright

OPINION

WRIGHT, Circuit Judge:

We must decide whether a state prosecutor who allegedly made false statements in an affidavit supporting an application for a search warrant should be accorded absolute immunity. We hold that, based on *Malley v. Briggs*, 475 U.S. 335, 342 (1986) and the functional analysis test, the prosecutor is not entitled to absolute immunity. We affirm and remand.

BACKGROUND:

In determining immunity, we must accept the plaintiff's allegations as true. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993). Lynne Kalina, a deputy prosecutor, was assigned to work on a case involving alleged theft of computer equipment from a private school in Seattle. She prepared an application for an arrest warrant and an information charging Rodney Fletcher with second-degree burglary. The warrant application was accompanied by a "Certification for Determination of Probable Cause," a sworn declaration describing the result of the police investigation. Based on this document, which she signed, the court issued an arrest warrant for Fletcher. The burglary charge was eventually dismissed when Fletcher's attorney discovered inaccuracies in the certification.

Fletcher brought a 42 U.S.C. § 1983 claim against Kalina in federal district court alleging civil rights violations. He contends that the certification contained information that Kalina knew or should have known was false. First, it said that Fletcher "has never been associated with the school in any manner and did not have permission

to enter the school or to take any property." Fletcher alleged that he had been hired by the school to install the glass partition on which his prints were found and that he had permission to enter the school. Second, the certification said that an electronics store employee identified Fletcher as the man who attempted to sell him computer equipment from the school. Fletcher contended that police reports indicated that no witness had identified him as a suspect although two were shown photo montages.

Upon a motion for summary judgment, the district court denied Kalina absolute immunity and held that qualified immunity was a question of fact to be determined at trial. This interlocutory appeal followed. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); 28 U.S.C. § 1291. We review de novo. *Jesinger v. Nevada Fed. Cred. Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

ANALYSIS:

Whether a state prosecutor is entitled to absolute or qualified immunity for her actions in procuring an arrest warrant is an issue of first impression in this circuit. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court first considered absolute immunity for prosecutors. The Court recognized that the prosecutor's job is both difficult and essential. It noted that the "office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict?" *Id.* at 422-24. The Court held that prosecutors were absolutely immune from prosecution for their actions during the initiation of a criminal case and its presentation at trial. The Court described their functions as "intimately associated with the judicial phase of the criminal process." *Id.* at 424.

The Court later explicitly held that when prosecutors perform administrative or investigative, rather than advo-

catory, functions they do not receive absolute immunity. *See Burns v. Reed*, 500 U.S. 478, 494-96 (1991). To determine whether an action is administrative/investigative or advocatory, we apply a "functional" analysis. *See id.* at 486. We look at "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). It follows that, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

Since *Imbler*, the Court has addressed prosecutorial immunity in two cases. In *Burns*, 500 U.S. at 487, it held that a prosecutor is absolutely immune for his conduct in presenting evidence at a probable-cause hearing for a search warrant, but is not absolutely immune when giving legal advice to the police on whether they have probable cause to arrest. The Court reasoned that appearing in court and presenting evidence were "clearly" advocatory. *Id.* at 491. It did not believe, however, that advising the police on whether they could hypnotize a witness and whether they had probable cause to arrest was so closely associated with the judicial process that it required absolute immunity. *Id.* at 493. The Court emphasized that "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87.

In *Buckley*, 509 U.S. at 273, the Court held that a prosecutor is not absolutely immune when he allegedly fabricates evidence during the investigation by retaining a dubious expert witness. The Court reasoned that, because the prosecutor did not yet have probable cause to arrest at the time he was shopping for an expert witness, the function was investigative, not advocatory.¹ The Court commented that:

¹ The Court also held that the prosecutor's allegedly false statements during a press conference were not protected by absolute

There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. (citation omitted).

The Supreme Court has never addressed whether a prosecutor is absolutely immune for conduct in obtaining a search warrant. In *Malley v. Briggs*, 475 U.S. 335, 342 (1986), however, the Court held that a police officer who secures an arrest warrant without probable cause cannot assert an absolute immunity defense.

The officer made two arguments, both rejected by the Court. He analogized himself to a complaining witness who files a certification. *Id.* at 340. The Court found this argument unavailing because complaining witnesses were not absolutely immune at common law. *Id.* at 340. The officer next argued that his action was similar to a prosecutor seeking an indictment, a function that merits absolute immunity. The Court also rejected this argument, reasoning that the officer's actions were "further removed from the judicial phase of criminal proceedings. . . ." *Id.* at 342-43.

Relying on *Malley* and *Buckley*, we hold that a prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant. See also *Kohl v.*

immunity because the comments had no direct tie to the judicial process and because out-of-court statements to the press were not absolutely immune at common law. See *Buckley*, 509 U.S. at 276-78.

Casson, 5 F.3d 1141, 1146 (8th Cir. 1993) ("the function of seeking an arrest warrant is subject only to qualified immunity, not absolute immunity."). Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*.²

Kalina argues that it is "standard practice" in King County for the prosecutor to prepare the certification, but the local rules do not limit who may prepare it. See Wash. Superior Ct. Cr. R. 2.2(a). If a police officer or complaining witness had filed the same certification, she or he would not receive absolute immunity. See *Malley*, 475 U.S. at 340-41. To hold that Kalina is absolutely immune for performing the same task would be inconsistent with the Court's functional analysis.

We note that the Sixth Circuit reached a different result when faced with a prosecutor's use of allegedly false, coerced statements to obtain an arrest warrant. In *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986), cert. denied, 481 U.S. 1023 (1987), the court held that the "decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in 'initiating a prosecution,' which is protected under *Imbler*."³ In light of more recent Supreme Court law and

² We are not persuaded by Kalina's argument that *Malley* can be distinguished based upon the time the declaration was filed. She argues that Officer Malley filed his declaration early in the case, which made his action investigatory. She contends that her declaration was filed later, making it an advocacy act. In *Malley*, 475 U.S. at 337, the application for an arrest warrant was filed simultaneously with the felony complaint. Here, the application for the arrest warrant was filed with the information. There is little, if any, distinction.

³ Kalina also relies on *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983)). In *Lerwill*, 712 F.2d at 437, the Tenth Circuit granted a prosecutor absolute immunity because "[i]n seeking a warrant for . . . arrest, [the prosecutor] was acting as an advocate for the

the Eighth Circuit's opinion in *Kohl*, we decline to follow the Sixth Circuit. *Joseph* was issued before the Supreme Court decided *Buckley*, which emphasized that it would be "incongruous" to expose police to potential liability while protecting prosecutors for the same act. Moreover, although decided shortly after *Malley*, the opinion does not consider that case in deciding whether seeking an arrest warrant merits absolute immunity.

Finally, Kalina argues that policy concerns dictate a finding of absolute immunity. Absolute immunity serves a vital public interest by protecting prosecutors from distracting and time-consuming litigation. The Supreme Court, however, has made it clear that qualified immunity is generally sufficient to protect against frivolous lawsuits. The district court explicitly noted that qualified immunity was a question of fact in this case. We emphasize that Kalina may be able to avoid liability by showing at trial that her conduct did not violate a clearly established right of which a reasonable person would have known. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has noted that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

CONCLUSION:

Kalina is not absolutely immune for her actions in filing a declaration for an arrest warrant. We AFFIRM the denial of summary judgment and REMAND for further proceedings.

State before a neutral magistrate." This case, however, predates *Malley*, *Burns* and *Buckley*.

WASHINGTON CRIMINAL RULE 2.1

RULE 2.1 THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(b) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(c) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(d) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

(e) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

(f) Defendant's Criminal History. Upon the filing of an indictment or information charging a felony, the pros-

ecuting attorney shall request a copy of the defendant's criminal history, as defined in RCW 9.94A.030, from the Washington State Patrol Identification and Criminal History Section.

[Amended effective July 1, 1984; September 1, 1986.]

WASHINGTON CRIMINAL RULE 2.2

RULE 2.2 WARRANT OF ARREST AND SUMMONS

(a) **Warrant of Arrest.** If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest must be supported by an affidavit or affidavits or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The court must determine that there is probable cause before issuing the warrant. The finding of probable cause may be based on evidence which is hearsay in whole or in part, subject to constitutional limitations.

(b) **Issuance of Summons in Lieu of Warrant.**

(1) *Generally.* If an indictment is found or an information is filed, the court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.

(2) *When Summons Must Issue.* If the indictment or information charges only the commission of a misdemeanor or a gross misdemeanor, the court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant.

(3) *Summons.* A summons shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall state the name of the defendant and shall summon the

defendant to appear before the court at a stated time and place.

(4) *Failure to Appear on Summons.* If a person fails to appear in response to a summons, or if service is not effected within a reasonable time, a warrant for arrest may issue.

(c) *Requisites of a Warrant.* The warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify the name of the defendant, or if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall command that the defendant be arrested and brought forthwith before the court issuing the warrant. If the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release.

(d) *Execution; Service.*

(1) *Execution of Warrant.* The warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer.

(2) *Service of Summons.* The summons may be served any place within the state. It shall be served by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant's address.

(e) *Return.* The officer executing a warrant shall make return to the court before whom the defendant is brought pursuant to these rules. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled. The person to whom a summons has been delivered for service shall,

on or before the return date, file a return with the court before which the summons is returnable. For reasonable cause, the court may order that the warrant be returned to it.

(f) *Defective Warrant or Summons.*

(1) *Amendment.* No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any irregularity in the warrant or summons, but the warrant or summons may be amended so as to remedy any such irregularity.

(2) *Issuance of New Warrant or Summons.* If during the preliminary examination of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or describe the defendant or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons, there is reasonable ground to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but may allow a new indictment or information to be filed and shall thereupon issue a new warrant or summons.

WASHINGTON REVISED CODE 36.27.020

36.27.020. Duties

The prosecuting attorney shall:

(1) Be legal adviser of the board of county commissioners, giving them his or her written opinion when required by the board or the chairperson thereof touching any subject which the board may be called or required to act upon relating to the management of county affairs;

(2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;

(4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

(5) Attend and appear before and give advice to the grand jury when cases are presented to it for consideration and draw all indictments when required by the grand jury;

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

(7) Carefully tax all cost bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by law;

(8) Receive all cost bills in criminal cases before district judges at the trial of which the prosecuting attorney was not present, before they are lodged with the board of county commissioners for payment, whereupon the prosecuting attorney may retax the same and the prosecuting attorney must do so if the board of county commissioners deems any bill exorbitant or improperly taxed;

(9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge to the special consideration of the proper jury;

(10) Examine at least once in each year the public records and books of the auditor, assessor, treasurer, superintendent of schools, and sheriff of his or her county and report to the board of county commissioners every failure, refusal, omission, or neglect of such officers to keep such records and books as required by law;

(11) Examine once in each year the official bonds of all county and precinct officers and report to the board of county commissioners any defect in the bonds of any such officer;

(12) Make an annual report to the governor as of the 31st of December of each year setting forth the amount and nature of business transacted by the prosecuting attorney in that year with such other statements and suggestions as the prosecuting attorney may deem useful;

(13) Send to the state liquor control board at the end of each year a written report of all prosecutions brought under the state liquor laws in the county during the preceding year, showing in each case, the date of trial, name of accused, nature of charges, disposition of case, and the name of the judge presiding;

(14) Seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

Enacted by Laws 1963, ch. 4, § 36.27.020, eff. Feb. 18, 1963. Amended by Laws 1975, 1st Ex.Sess., ch. 19, § 1, eff. May 6, 1975; Laws 1987, ch. 202, § 205.

WASHINGTON REVISED CODE 10.37.010

10.37.010. Pleadings required in criminal proceedings

No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

Enacted by Laws 1925, Ex.Sess., ch. 150, § 3.